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No. 09-1285

Supreme Court, U.S.
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In The
Supreme Court of the United States

TED L. PAPPAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO SOLICITOR GENERAL'S BRIEF IN OPPOSITION

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INTRODUCTION

The district court, in granting the Motion to Suppress, foreshadowed the dire consequences of a reversal of its ruling. The Honorable Charles N. Clevert, Jr. wrote:

> . . . little in the affidavit distinguishes Pappas from any other citizen who received unsolicited email. The only fact connecting Pappas to child pornography in the warrant affidavit was that a third party emailed illegal images eighteen months earlier to an account once registered to Pappas but since deleted. Other information presented in the warrant – that Pappas maintains a different email account through AOL . . . ; that Pappas was arrested over twenty years ago for burglary; that Pappas is employed, possesses a drivers license, and lives in Wauwatosa – is insignificant in the absence of any affirmative steps taken by Pappas to access child pornography.

Pet. App. 31-32.

In light of the appellate court's reversing decision, every one of AOL's 46.6 million email account holders *and* every one of Gmail's 91.9 million email account holders *and* every one of Hotmail's 43.5 million email account holders, plus millions of other email account holders are subject to search if

someone emails them illegal matter. *See* http://techcrunch.com/2009/01/14/gmail-grew-43-percent-last-year-aol-mail-and-hotmail-need-to-start-worrying/ (last accessed July 23, 2010).

The Solicitor General labors to obscure the shocking fact that, based on the appellate court's decision, any email user's computer is subject to search for receipt of child pornography, if targeted with illegal emails. Innocent email users will unavoidably be targeted with illegal emails, despite the "inherent risks" noted by the appellate court. Pet. App. 6. Pushers of child pornography do not differ drastically from people who offer and front illegal drugs to strangers, some of whom could be informants. When hope of potential gains outweighs the perceived risks, illegal images will be sent to potential new consumers, e.g. those who consume adult pornography, in the hopes of getting them hooked.

The appellate court concluded that being an addressee of only one image of child pornography allows an officer to reasonably believe that the addressee is a willing recipient of child pornography, because of the "risk inherent in sending" illegal images. *Id.* If being an addressee of one illegal image, with no other relevant affirmative act, supports probable cause in the Seventh Circuit, then that circuit's law conflicts with the law in other circuits, as argued in the Petition, at pages 13-17.

Child pornography was emailed to Petitioner in so-called "embedded attachments," which would

automatically appear on the recipient's screen upon opening the message, without the recipient having to perform a second function to display the attachment. In a similar way, innocent users such as the prosecutors and defense counsel in this case, or court staff, can be targeted with illegal emails and unwittingly receive child pornography. Even if immediately deleted, such child pornography is retained in the free space of computer hard drives for years or even decades. Computer owners will then be subject to search and prosecution for receipt and/or possession of child pornography, although the Government has no proof that they did any act other than delete that which was unsolicited, and which they received unknowingly and unwillingly.

The Government in this case conceded probable cause when it invoked the *Leon* exception. After conceding probable cause the Government argued that the search ought to be salvaged, because *the same* government which conceded probable cause had reviewed the affidavit prior to its submission to the magistrate.

The good faith exception will not be manipulated to cloak the fact that the government acts as "the fox guarding the hen house" in first approving affidavits and later invoking its own approval to salvage searches concededly lacking in probable cause. Neither the Fourth Amendment nor the *Leon* exception will be twisted to sanction such an insidious maneuver. Were this Court to sanction it, federal agents would routinely have local prosecutors peruse

their affidavits, because that activity would automatically defeat a challenge to probable cause.

The Solicitor General labors to camouflage the stark reality that the affidavit underlying the warrant in this case contained "*nothing* indicating that evidence of receipt or possession of child pornography would likely exist at Pappas' residence." Pet. App. 28 (emphasis added). The word "nothing" denotes the utter lack of any indicia of probable cause. The district court stated: the "good faith exception could not have been designed to save searches stemming from a warrant affidavit so objectively lacking in probable cause." *Id.* at 32.

The Fourth Amendment protects America's email users from the unreasonable searches sanctioned by the appellate court in this case. The good faith exception cannot save searches stemming from affidavits "so objectively lacking in probable cause." *Id.* If this Court felt that the good faith exception applied to affidavits objectively lacking in probable cause, it would not have recognized exceptions to the *Leon* exception, one of which was invoked by Petitioner. *See United States v. Leon*, 468 U.S. 897, 919 at n.20, 923 (1984); *see also* Pet. App. 5.

I. THE APPELLATE COURT'S RULING SHOULD BE REVIEWED NOW, DESPITE ITS INTERLOCUTORY NATURE

A. This case is extraordinary and extraordinarily urgent.

This Court must review this extraordinary case regardless of its interlocutory posture. The fate of thousands of law-abiding email users hangs in the balance. Thousands of innocent people who receive and delete unwanted emails could have their homes searched just because they once had an email address and access to a computer.

This is one of a handful of "extraordinary cases" with "unusual factors" and of "peculiar gravity and general importance," meriting this Court's resolution before the proceedings below become final. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also* Robert L. Stern & Eugene Gressman, *et al.*, SUPREME COURT PRACTICE § 4.18, at 260 (8th ed. 2002) ("[I]n the absence of some . . . *unusual factor*, the interlocutory nature of a lower court judgment will *generally* result in a denial of certiorari." (emphasis added)).

This case is extraordinary, first, because it affects the vast population of citizens who have email accounts; and second, because it affects these citizens' fundamental constitutional right to be secure in their persons and effects, and free from unreasonable searches. *See e.g. Herring v. United States*, 129 S. Ct. 695, 707 (2009). In its practice, this Court has found

cases "extraordinary" and worthy of certiorari despite their interlocutory status, when they implicated fundamental constitutional rights.

Review by this Court is urgently needed also because the challenged decision of the appellate court affects the conduct of hundreds of officers in seeking, obtaining, and executing search warrants on a daily basis, all over this country. The Internet Crimes Against Children (ICAC) Task Force Program has 61 regional Task Force Agencies to help law enforcement agencies eradicate criminal internet abuse targeting children. See http://www.icactraining.org/ (last accessed July 23, 2010).[1] These Task Forces, funded by state, local, and federal money, and the law enforcement officers who work with them, process cases in a formulaic manner, relying on canned affidavit language. The *Weber* court for good reason labeled such language "boilerplate." *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990). Except for a few "fill in the blank" areas, page after page of boilerplate language is inserted into affidavits that contain no information specific to the defendant, to convince over-worked and unsuspecting Magistrates to issue warrants. Day after day, in district after district, local Task Force agents insert entire sections of boilerplate into child pornography affidavits, regardless of the suspect's individual conduct.

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[1] One such ICAC task force helped execute a warrant related to this case. *See* Pet. App. 75.

Hundreds of such search affidavits are being generated and some warrants are being executed every day while this Court ponders this Petition.

Unless this Court accepts the Petition and corrects the appellate court's misapplication of *Leon* and of the principles of the Fourth Amendment, affidavits stating no connection to an individual defendant will be submitted and warrants will issue even when, as in this case, "there is not a whit of evidence in the affidavit indicating that [a suspect] fit a collector profile." Pet. App. 27.[2]

B. Now is the time to resolve the constitutional issues posed in the Petition.

The constitutional issues posed in this Petition must be decided now, because email users cannot prevent being targeted with unsolicited emails; and because scores of search warrants are likely being drafted for the search of computers whose owners did not knowingly receive the illegal matter emailed to them.

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[2] The district court also clearly noted that there was no evidence here that Petitioner "uploaded illegal images, participated in internet forums, or in any way controlled the illegal images at issue." Pet. App. 27. This fact sets this case apart from the other appellate cases involving probable cause in internet-related possession of child pornography, as discussed on pages 14-16 of the Petition.

This Court has a broad obligation to resolve constitutional questions when necessary. *See e.g. Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) ("It has long been [the Court's] considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision.") (citations omitted).

The "public importance of the questions" presented in the Petition and "the duty which rests on the courts . . . to preserve unimpaired the constitutional safeguards of civil liberty" create the necessity for this Court to "consider and decide th[e posed constitutional] questions without any avoidable delay." *See Ex parte Quirin*, 317 U.S. 1, 23 (1942). This Court should resolve these questions now rather than abstaining and waiting for the result of the prosecution. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

C. The reasons to accept the Petition far outweigh the reasons against acceptance.

The Petition presents extraordinary circumstances and weighty constitutional issues, both of which support certiorari review despite the case's interlocutory posture. *See e.g. Mazurek v. Armstrong*, 520 U.S. 968 (1997); *Frisby v. Schultz*, 487 U.S. 474 (1988) (First Amendment challenge to ordinance

barring residential picketing where further proceedings would not aid Court).

The several factors addressed below further support review now.

The questions posed by Petitioner can be decided on the available record and the constitutional questions brought on the Petition were thoroughly briefed in the court of appeals. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts.").

If the Petition is not granted, proceedings on remand from the appellate court to the district court will rely on the constitutional error challenged by Petitioner, which should be avoided.

Issuance of certiorari now is also necessary to avoid "extraordinary inconvenience and embarrassment in the conduct of the case." *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893). If this Court grants the Petition and agrees with the Petitioner, the incalculable extraordinary inconvenience and embarrassment – indeed hardship – of the trial, and of subsequent appeals if convicted, will be avoided. This, in turn, will protect the Petitioner from possible bankruptcy, personal and family crises, social stigma, loss of employment, and other all-too-common dire collateral consequences of federal prosecution on charges involving child pornography. *See id.*

Finally, by the express terms of a statute, this Court has jurisdiction to grant the Petition although the judgment is not final. The applicable jurisdictional statute is Title 28 United States Code § 1254(1), which in pertinent part provides: "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The traditional reasons for denying certiorari review at this time are absent in this case.

One reason why this court "generally" awaits final judgment in lower courts before exercising its certiorari jurisdiction is that "many [non-final] orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *Am. Constr. Co.*, 148 U.S. at 384. Such is not the case here, so this reason does not support denial of certiorari.

Absent here are also various other reasons for which this Court in the past decided to wait for the final judgment, including avoidance of what would be an advisory opinion if further proceedings mooted the issue raised in the petition and allowing the Court to assess any federal-law issue upon a complete and settled record. *See e.g. Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123-24 (1945); *North Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973); William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983).

In this case a review of the appellate court's decision favorable to Petitioner will in effect decide the merits of the case. Without the evidence sought to be suppressed, the prosecution cannot proceed.

No substantial progress has been made towards the final decision, as the case is in pre-trial posture. The district court stayed proceedings. The government did not object to the stay. Thus, granting review at this time would not halt a process that is on track towards a quick completion. In fact, granting the Petition would save the parties and the courts from substantial wasted effort and would conserve judicial resources. Review of the interlocutory ruling in this case would spare the parties inconvenience, litigation costs, and a delay in determining ultimate justice – rather than the opposite. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152-53 (1964).

This Court seldom grants review in cases that would benefit from further factual development of the issues. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). Here, the interlocutory posture of the appellate court's ruling leaves no unsettled factual questions critical to the Petition; or to the underlying constitutional rules that Petitioner asks this Court to employ.

For the above reasons, this Court should now accept this case for review and should not deny the Petition based on the case's interlocutory posture.

II. THE APPELLATE COURT DID RULE ON THE ISSUE OF PROBABLE CAUSE AND SO SHOULD THIS COURT

The Solicitor General errs in stating, at pages 9-10 of his Brief in Opposition, that this Court should not pass on the issue of probable cause because it was not passed-on by the appellate court.

The district court held that the *Leon* exception did not apply because the warrant was so lacking in probable cause as to make official belief in the existence of probable cause entirely unreasonable. *See* Brief in Opposition 12.

The appellate court reversed, holding that indicia of probable cause were not so lacking from the affidavit as to prevent reasonable official belief in its existence. The appellate court concluded that the warrant affidavit stated sufficient indicia of probable cause for the *Leon* exception to apply. *See* Pet. App. 5-6, 9-10; *see also* Brief in Opposition 8.

Thus, the appellate court's ruling on the *Leon* exception included a ruling on probable cause. The *Leon* exception and probable cause are two issues that are inseparably interwoven here, contrary to the Solicitor General's Brief. *See id.* at 9-10.

As argued at pages 13-17 of the Petition, no other appellate court would rule that this affidavit presented sufficient probable cause to allow objective official belief in the existence of probable cause. This indicates that the appellate circuits are split on this

issue, contrary to the Solicitor General's argument on pages 10-11 of his Brief in Opposition.

Therefore, this Court should address "probable cause" in the warrant affidavit, as one of the crucial, vibrant constitutional issues posed by this extraordinary and urgent case.

III. THE AFFIDAVIT DID NOT ALLEGE ANY FACTS TENDING TO PROVE "RECEIPT" OF CHILD PORNOGRAPHY

Based solely on the fact that several emails with child pornography were sent to Petitioner, the appellate court concluded, Pet. App. 5-6, that Petitioner received those emails and that the warrant affidavit "established" probable cause for Petitioner's "receipt" of child pornography.[3] The court assumed, without analysis or support in the affidavit, that Petitioner "received" the eleven emails with illegal content sent to him and that he was a "recipient." Pet. App. 9. This conclusion is erroneous as stemming from unverified assumptions and the fallacious logic of "begging the question." *Id.*

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[3] The Solicitor General attempts to validate the search by referring loosely to seemingly incriminating evidence gathered as a result of the search. Brief in Opposition 3. Any such evidence would be subject to suppression as fruit of a poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The Petitioner has argued from day one in this prosecution that the warrant contained no evidence of his receipt or possession of child pornography – none; and that it lacked any indicia of probable cause that would support reasonable official belief that evidence of receipt of child pornography would be found on his computer – because it only asserted that he had been targeted with illegal emails. *See e.g.* Pet. App. 5, 6, 7. The district court agreed with the Petitioner. *Id.* So would other appellate courts, as argued in the Petition and elsewhere in this Reply. Petition at 14-17.

Yet the Court of Appeals for the Seventh Circuit ruled that being an addressee of emails with attached child pornography – with nothing more – sufficiently supports reasonable official belief that a suspect knowingly received child pornography. That holding was contrary to the holdings of other appellate courts. *Id.*

Because the appellate court disagreed with the Petitioner's argument regarding probable cause, which was supported by the opinions of other appellate courts, this Court can and should properly address it, contrary to the Solicitor General's Brief.

For all the above reasons, this Court should grant the Petition.

Respectfully submitted,

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